

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Hand Held Products, Inc. Request for)	WT Docket 01-309
a Determination Regarding Application of)	
the Commission's Rules Governing)	
Hearing-Aid Compatible Telephones)	

REPLY COMMENTS OF HAND HELD PRODUCTS, INC.

Hand Held Products, Inc. ("HHP"), by its undersigned counsel, hereby submits these reply comments in response to the Commission's Public Notice¹ regarding HHP's request for a determination that the Hearing Aid Compatibility Act, 47 U.S.C. § 610 ("HAC Act"), and the implementing regulations in Sections 20.19 and 68.4 of the Commission's Rules, 47 CFR §§ 20.19, 68.4, do not apply to HHP's mobile computing line of devices. In response to the Commission's invitation for comments on HHP's petition filed on April 28, 2006 (Petition"), comments opposing HHP's request were received from two organizations – the American Association of People with Disabilities ("AADP") and the Hearing Loss Association of America ("HLAA") – and from an individual doing business as the Deafness Research Foundation ("DRF"). As will be explained below, none of these comments addresses the merits of HHP's legal argument that the HAC Act, as interpreted by the Commission, is not intended to and does not apply to HHP's line of data collection devices. HHP's computing devices qualify as a form of "business" communications device of the nature the Congress intended to exempt from the HAC Act at the time of its passage almost 20 years ago.

¹ DA 07-103, released January 18, 2007.

**I. None of the Opposing Comments Addresses
the Legal Merits of HHP's Request for a Determination**

As recognized by the Commission on page 2 of its Public Notice, the heart of HHP's Petition is a request for determination under Section 1.2 of the Commission's Rules that the HAC Act and implementing regulations do not, as a matter of law, apply to its mobile computing devices. Each of the comments received in opposition to HHP's request, however, mistakenly treats the Petition as one for a waiver of the application of the HAC Act under the differing standards found in Sections 1.3 and 1.925 of the Rules, 47 CFR §§ 1.3, 1.925.² In so arguing, the comments mistakenly presume the applicability of the HAC Act to HHP's products and advance largely irrelevant policy reasons as to why a waiver from application of the Act is not appropriate.

Fundamentally, the commenting parties err by starting from the premise that the HHP Dolphin product line described in the Petition are mobile telephony devices and that exemption of the product line from the HAC Act would in some manner result in discrimination against hearing-impaired employees in the workplace who would not have access to the voice capabilities of the devices. As explained by HHP in its Petition, however, the Dolphin line is a series of computing devices providing primarily wireless data collection and transmission capabilities, utilizing Bluetooth and WAN technologies. The devices have been developed for and are offered to the enterprise market, and are not offered for residential or consumer applications. The automated data capture and transmission capabilities of HHP's Dolphin devices reduce the error rate experienced with human recording of such data. The functions provided by the devices are equally accessible by employees of HHP's customers regardless of their hearing capabilities. As such, they are "hearing-impaired neutral" devices.

² See AADP Comments, at 1; HLAAs Comments, at 3; DRF Comments, at 2.

Two models of the Dolphin series are optionally equipped with a GSM radio capable of operation in the 850/1800/1900 MHz bands enabling real-time voice, as well as data, communication capability. The GSM service, however, must be procured independently by the enterprise customer. According to HHP's customer records, no major enterprise-level U.S. customers have taken advantage of this optional voice capability, which is clearly an ancillary service offering of the product line.³ In fact, the single largest installation – 31,000 units – subscribes to data-only plans; the GSM voice capability is not even available to employees of this customer.

Nevertheless, the commenting parties all assert that this ancillary voice capability of HHP's computing devices qualifies as a "telephone" service which the HAC Act is intended to regulate. This position misunderstands the original intent of the HAC Act when adopted by Congress and of the more recent decision of the Commission to extend the reach of the Act to consumer mobile telephony devices.

As the Commission has recognized, public mobile telephones were originally exempted from the HAC Act because they were not regarded as "essential" for public consumption purposes, when the Act was adopted by Congress in 1988, but were recognized as "primarily business tools" of "secondary" import to the needs of the hearing-impaired public.⁴ In its *Mobile Telephone HAC Order*, the Commission stated: "The legislative history of the HAC Act indicates that Congress provided the exemption to wireless phones because it viewed them as

³ As already represented by HHP, Petition at 4, the only known enterprise customer currently making use of the voice capability is the German railroad system.

⁴ *In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, FCC 03-168, released August 14, 2003 ("*Mobile Telephone HAC Order*"), ¶¶ 8-9.

complements, not substitutes, for wireline telephones.”⁵ It was only when wireless phones and services became mass market consumer devices and services that the Commission exercised its prerogative under the Act to extend the Act’s reach by regulatory edict to common carrier mobile telephones. The Commission explained in making this decision that wireless telecommunications had evolved “from what was once considered a complementary business service to a mass market consumer offering that delivers an essential service, telecommunications, through a platform that offers users the benefits of mobility and greater independence.”⁶

The commenting parties in the present proceeding, however, seek to argue that the application by the Commission of the requirements of the HAC Act to mobile telephones as a mass market, consumer product should also engulf specially developed business tools, like HHP’s Dolphin line of computing devices, developed for an enterprise market and intended to operate primarily in a data-transmission mode. This conclusion simply does not follow from the reasoning articulated by the Commission in its *Mobile Telephone HAC Order*; it reflects either a serious misunderstanding, or misrepresentation, of the intention of the Commission in its extension of the Act to the public mobile telephony market.

The commenting parties attempt to argue that, if Section 20.19 of the Commission’s Rules, 47 CFR § 20.19, is not interpreted to include within its scope the ancillary voice capability of HHP’s computing devices, hearing-impaired employees of HHP’s customers will in some manner be either “discriminated against” or otherwise unfairly disadvantaged in their use of such devices, thereby rendering the devices incompatible with the Commission’s

⁵ *Id.*, ¶ 27.

⁶ *Id.*, ¶ 36.

implementation of HAC policies.⁷ In applying the HAC Act to mass market mobile telephony, however, the Commission was motivated in part by its finding that employers are increasingly relying on digital wireless phones and services to stay in contact with their employees in the field.⁸ The Commission, has, therefore, already recognized that extension of the Act to common carrier cellular systems will help level the competitive field for hearing-impaired employees. Extension of the Act to computing devices of the nature marketed by HHP is unnecessary to achieve this end; the Commission already recognizes that consumer mobile telephony serves this purpose.

The fact remains that, notwithstanding the assertions of the commenting parties to the contrary, the HHP Dolphin product line is essentially a business communication device of the nature that the Congress originally exempted from the scope of the HAC Act. The Dolphins are not available in any cellular stores and are not offered as a retail product. The Commission's extension of the Act in 2003 to cover mass marketed consumer mobile telephones was not intended to include business devices of this nature, as well. To remove uncertainty regarding a statutory issue of commercial significance, the Commission should, therefore, pursuant to Section 1.2 of its Rules, 47 CFR § 1.2, clarify that the HAC Act, and the Commission regulations extending the reach of the Act to mobile telephony, do not cover enterprise computing devices of the nature developed and marketed by HHP.

II. Alternatively, HHP is Entitled to a Waiver of Application of Sections 20.19 and 68.4 of the Commission's Rules to its Computing Devices

In its Public Notice, page 2, the Commission also invited comments on whether, to the extent its HAC rules apply to HHP's devices, those rules should be waived. HHP submits that,

⁷ AADP Comments, at 2-5; HLAA Comments, at 3; DRF Comments.

⁸ *Mobile Telephone HAC Order*, ¶ 30.

should the Commission determine that the HAC Act and its implementing regulations are intended to cover HHP's computing devices, then alternatively it should waive application of those rules as applied to HHP's products.

Under Section 1.925(b) of the Commission's Rules, 47 CFR § 1.925(b), waiver of a rule from particular circumstances may be granted by the Commission where (i) the underlying purpose of the rule would not be served and grant of the waiver would be in the public interest, or (ii) application of the rule would be inequitable, unduly burdensome or contrary to the public interest. In the present case, HHP's circumstances satisfy both of these standards for waiver of the Commission's HAC rules.

First, as has been demonstrated above and in the Petition, the underlying purpose of the HAC Act and implementing rules would not be advanced by applying them to HHP's computing devices, as the primary capability of those devices is for data collection and transmission purposes, which capabilities can be utilized by employees of HHP's customers without regard to their hearing capabilities. Indeed, the data-oriented capabilities of HHP's computing devices actually *advance* the ability of hearing-impaired individuals to function with the assistance of such devices on a basis equal to that of employees with normal hearing. HHP's Dolphin line of devices has only an ancillary voice communication capability, and the regulation of that ancillary capability should not govern the primary application for which the products were developed. Moreover, HHP has demonstrated in its Petition that the ancillary voice capability of its computing devices are not generally used by customers in the United States and, therefore, under the Commission's jurisdiction. The Commission has found in its *Mobile Telephone HAC Order* that extension of the HAC Act to consumer mobile telephony devices will adequately provide hearing-impaired employees with access to mobile voice services in the workplace. In summary,

no public interest would be served by application of the HAC Act and implementing regulations to HHP's business communication devices.

On the other hand, application of the Commission's implementing regulations to HHP's devices would represent an unnecessary and undue burden for the manufacturer. HHP has demonstrated in its Petition that the need to comply with HAC requirements for the ancillary voice capability of its devices would increase the production cost of its devices significantly, thereby depressing their marketability. By imposing unnecessary costs on HHP's production of its devices, the Commission could unwittingly inhibit the availability of such devices in the enterprise sector, which would not serve the public interest.

The HAC Act contains specific authority for the Commission to waive the requirements of the statute for "new telephones, or telephones associated with a new technology or service" where it determines, *inter alia*, that compliance with such requirements would increase the cost of such telephones to an extent that the technology or service could not be successfully marketed. 47 U.S.C. § 610(b)(3). In its *Mobile Telephone HAC Order*, the Commission determined that the incorporation of hearing aid-compliant technologies into mass marketed wireless telephones would open the market for such devices to the hearing-impaired public and would, thereby, in the long run drive down the unit cost of production for such devices.⁹ The same analysis, however, will not apply to HHP's computing devices, which are developed for and marketed to a much narrower enterprise market. The unit cost required to accommodate HAC requirements for the devices' ancillary voice capacity is more likely, therefore, unduly to inflate the price and impact the marketability of those devices.

⁹ *Id.*, ¶ 52.

For these reasons, HHP submits that application of the HAC implementing regulations to its computing devices will not advance the public interest, but would instead unduly burden its effort to offer a technologically innovative product line. Pursuant to Section 1.925 of the Commission's Rules, HHP submits that, if the Commission determines that its computing devices are covered by the HAC Act, it should waive the application of the implementing regulations of that Act for mobile telephone devices to HHP's product line.

III. The Americans With Disabilities Act is Irrelevant to the Merits of HHP's Petition for Determination

The AADP cites the Americans With Disabilities Act ("ADA")¹⁰ as a leading policy basis for its opposition to HHP's request for a determination that the HAC Act does not apply to its computing devices. AADP argues broadly that the ADA prohibits employers from discriminating among employees on the basis of disability, including hearing disability, and asserts that HHP should not be permitted to make products "that may perpetuate acts of discrimination either directly or indirectly."¹¹

Putting to one side AADP's sweeping gloss on the intent and applicability of the ADA, the statutory thrust of its argument in the context of this proceeding is essentially irrelevant. The Commission has already held that, notwithstanding its lofty anti-discrimination objectives, "the ADA, in and of itself, does not fulfill the Congressional mandate of the HAC Act to 'eliminate the disparity between hearing aid-users and non-users in obtaining access to the telephone network'."¹² The Commission instead concluded that the more specific directives of the HAC Act should govern its development of policies for access by hearing-impaired individuals to

¹⁰ 42 U.S.C. §§ 12101-12213.

¹¹ AADP Comments, at 2-3.

¹² *In the Matter of Access to Telecommunications Equipment and Services by Persons With Disabilities*, Report and Order, FCC 96-285, released July 3, 1996 ("Telecom Disabilities Order"), ¶ 19.

telecommunications services.¹³ Thus, AADP's effort to color in highly subjective terms by invoking the ADA the Commission's consideration of HHP's request for a determination of the applicability of the HAC Act is baseless.

IV. AADP's Section 255 Discussion is Substantively Inapplicable and Procedurally Inappropriate

The AADP devotes a substantial portion of its comments on HHP's Petition to an argument that HHP's Dolphin line of computing devices do not meet the requirements of Section 255 of the Communications Act, 47 U.S.C. § 255. Section 255(b) of the Communications Act provides that "a manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable."

For purposes of its discussion, AADP assumes, without analysis, that HHP is subject to Section 255 as a result of its manufacture of the Dolphin line of computing devices. In its rules implementing Section 255, the Commission has defined "telecommunications equipment" as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services...."¹⁴ As has been discussed above and in HHP's Petition, however, the Dolphin line of computing devices is not "used by a carrier to provide telecommunications services." Instead, the computing equipment is used by enterprise customers for data gathering and transmission. The optional GSM voice capability of certain of the Dolphin models may be activated by the enterprise customer by acquiring service from Cingular. In other words, Cingular does not employ HHP's equipment as a vehicle for the distribution of its service offering. This raises a threshold question as to whether HHP's

¹³ Taken together with Title IV of the ADA governing TTY equipment. *Id.*, ¶ 20.

¹⁴ 47 CFR § 6.3(i).

computing devices are intended to fall within the scope of Section 255 of the Communications Act, as implemented by the Commission.

The Commission has also held that, although Section 255 and the HAC Act “share a similar goal, namely, access to the telecommunications network by individuals with disabilities,” neither Section 255 nor its legislative history address hearing aid compatibility *per se*.¹⁵ Moreover, the Commission has not adopted hearing aid-compatibility standards as part of its implementation of Section 255.¹⁶ As a result, Section 255 does not establish any performance standards for HHP’s products beyond those already set forth in the HAC Act and implementing regulations.

Even assuming, which HHP does not at this point concede, the applicability of Section 255 to the Dolphin line of computing devices, AADP’s analysis of HHP’s products compliance with this statutory provision is procedurally inappropriate. The Commission has held that Section 255 creates no private right of action for enforcement, and that the sole method for enforcement of the statutory provision is through a formal or informal complaint proceeding initiated before the Commission.¹⁷ The Commission’s rules spell out with specificity the requirements that consumers with disabilities must meet to initiate complaint procedures under the provision.¹⁸

Here, the Commission has invited public comments on HHP’s Petition for a determination of the applicability of the HAC Act to its product line or, in the alternative, for its entitlement to a waiver of the Commission’s implementing regulations under that Act. Even

¹⁵ *Telecom Disabilities Order*, ¶ 22.

¹⁶ *See, generally*, Part 6 of the FCC’s Rules.

¹⁷ *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934*, Report and Order and Further Notice of Inquiry, FCC 99-181, released September 29, 1999, §§ 109-122.

¹⁸ 47 CFR §§ 6.15-6.22.

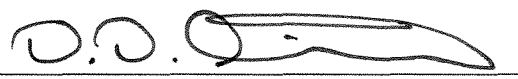
assuming that it has standing to allege a violation by HHP of the Section 255 standards for manufacturers, AADP should bring such an allegation through a separate complaint procedure, and not in the context of the current public comment cycle. In any case, for the reasons stated in the *Telecom Disabilities Order*, the merits of HHP's Petition should be evaluated under the specific terms of the HAC Act and its implementing regulations, rather than under the more generalized standards set forth in Section 255 and its implementing regulations, which do not specifically address hearing aid-compatibility standards.

Conclusion

The Commission's extension of the HAC Act to cover mass market mobile telephony devices was not intended to encompass business products such as HHP's Dolphin line of computing devices. The Commission should clarify this interpretation through a declaratory ruling. Alternatively, if the Commission does conclude that HHP's line of computing devices is subject to the HAC Act and its implementing regulations, the Commission should waive the application of those regulations to HHP's devices for the reasons set forth in the Petition and hereinabove.

Respectfully submitted,

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